(6)

No. 99-5739

Supreme Court, U.S.
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In the Supreme Court of the United States

DEWEY J. JONES, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 13, 1999
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RELEVANT DOCKET ENTRIES

Feb. 26, 1998	Complaint filed
March 5, 1998	Preliminary hearing and probable cause determination before magistrate judge
March 25, 1998	Indictment filed
May 4, 1998	Motion to dismiss filed by defendant Dewey Jones
May 19, 1998	Order of the district court denying motion to dismiss
June 16-18, 1998	Jury trial
June 18, 1998	Jury finds Dewey Jones guilty as charged in counts one, two, and three of indictment
June 23, 1998	Motion for acquittal filed by defendant Dewey Jones
July 27, 1998	Memorandum and order by the district court denying motion for acquittal
Aug. 26, 1998	Judgment of conviction entered by district court
Sept. 2, 1998	Notice of appeal from judgment of conviction
May 17, 1999	Opinion and judgment by the U.S. Court of Appeals for the Seventh Circuit affirming the judgment
Nov. 15, 1999	Order of the Supreme Court of the United States granting certiorari

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

UNITED STATES	)	**INDICTMENT**
	)	
v.	)	Cause no. 1:98-CR-
	)	
DEWEY J. JONES	)	Violations: 18 U.S.C. §§ 2, 844(i),
JERMAINE M. GIST	)	18 U.S.C. §924(c)
	)	26 U.S.C. §5861(f)

THE GRAND JURY CHARGES:

COUNT ONE

On or about February 23, 1998, in Allen County, Fort Wayne, in the Northern District of Indiana,

DEWEY J. JONES and
JERMAINE M. GIST,

defendants herein, maliciously damaged and destroyed and attempted to damage and destroy, by means of fire and explosive materials, real property, that being the residence of the Walkers, located at 2610 Marcy Lane, Fort Wayne, Indiana, which real property used in interstate commerce and in any activity affecting interstate commerce, and aided and abetted the same,

All in violation of 19 U.S.C. §§ 2, and 844(i).

THE GRAND JURY FURTHER CHARGES:

COUNT TWO

On or about February 23, 1998, in Allen County, Fort Wayne, Indiana, in the Northern District of Indiana,

DEWEY J. JONES and
JERMAINE M. GIST,

defendants herein, knowingly used and carried a firearm to wit: a destructive device, more specifically an incendiary bomb commonly known as a Molotov cocktail, during and in relation to a crime of violence for which they may be prosecuted in a court of the United States, arson in violation of 18 U.S.C. § 844(i), and aided and abetted the same,

All in violation of 18 U.S.C. §§ 2, and 924(c).

THE GRAND JURY FURTHER CHARGES:

COUNT THREE

On or about February 23, 1998 in Allen County, Fort Wayne, in the Northern District of Indiana,

DEWEY J. JONES,

defendant herein, knowingly made a firearm defined under 26 U.S.C. § 5845(a)(8) and (f), to wit: a destructive device, more particularly an incendiary bomb commonly known as a Molotov cocktail, without complying with the requirements under 26 U.S.C. § 5822 for making a firearm,

All in violation of 26 U.S.C. § 5861(f).

A TRUE BILL
/s/ SALLY B. HARROD
Foreperson

JON E. DeGUILIO
United States Attorney
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	1:98-CR-16
	)	
DEWEY J. JONES	)	

MEMORANDUM OF DECISION AND ORDER

This matter is before the Court on defendant Jermaine M. Gist's "Motion to Dismiss" filed April 21, 1998. The government responded to that motion on April 21, 1998. Also before the Court is a "Motion to Dismiss" filed by defendant Dewey J. Jones on May 4, 19898 to which the government responded that same date. For the following reasons, the motions to dismiss will be denied.

On March 25, 1998, a three count indictment was returned in the above-entitled cause. The charges in the indictment stem from the firebombing of a residential home on Marcy Lane in Fort Wayne, Indiana on February 23, 1998. Count one specifically alleges that both defendants "maliciously damaged and destroyed and attempted to damage and destroy by means of fire and explosive material, real property...used in interstate commerce and in any [sic] activity affecting interstate commerce" in violation of 18 U.S.C. § 844(i) and that they aided and abetted in the same in violation of 18 U.S.C. § 2.

Both defendants move to dismiss the indictment charging them "with a violation under the provisions of 18 U.S.C. section 844(i) for the reason that the indictment exceeds the statutory authority of the Government to bring this cause of action and the Court therefor lacks jurisdiction." Their argument is that jurisdiction does not exist under that statute in the case of arson of a private residence that is provided

natural gas obtained from out of state. In making that argument, they recognized that the Seventh Circuit in both *United States v. Stillwell*, 900 F.2d 1104 (7th Cir. 1990) and *United States v. Hicks*, 106 F.3d 187 (7th Cir. 1997) held otherwise but point out that there is contrary authority from other jurisdictions including *United States v. Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995) and *United States v. Denalli*, 73 F.3d 328 (11th Cir. 1996).

Given the precedent in the Seventh Circuit, this Court has no choice but to deny the motion to dismiss. In *Stillwell*, defendant argued that the residence was not "used in interstate or foreign commerce" or "in an activity affecting interstate or foreign commerce" as required by the statute because, as stipulated at trial, "the only nexus between Stillwell's house and interstate commerce was that Northern Illinois Gas Company supplied Stillwell's house with natural gas it obtained from sources outside the State of Illinois." *Stillwell*, 900 F.2d at 1106. Noting that "[t]his court has considered, but left open, the question whether the supply of interstate natural gas alone satisfies the arson statute's commerce requirement," the Seventh Circuit held that it "believe[d] Congress intended § 844(i) to reach a private residence which is supplied with natural gas." *Id.*, at 1107.

Subsequent to *Stillwell*, the United States Supreme Court in *United States v. Lopez*, 115 S.Ct. 1624 (1995) held that the Gun-Free School Zones Act (18 U.S.C. § 922(q)(1)(A)) which made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable probable cause to believe is a school zone" exceeded Congress' commerce clause authority since possession of a gun in a local school zone was not economic activity that substantially affected interstate commerce. That case, however, did not implicitly overrule *Stillwell* or similar Seventh Circuit authority such as *United States v. Martin*, 69 F.3d 1422, 1426-28 (7th Cir. 1995) or *United States v. Menzer*, 29 F.3d 1223, 1230 (7th Cir. 1994).

Indeed, in *United States v. Hicks*, 106 F.3d 187 (7th Cir. 1997), defendant argued that *Lopez* did in fact overrule Seventh Circuit decision such as *Menzer* and *Martin* but the Seventh Circuit wrote that "Hicks misunderstands *Lopez*." Although *Hicks* involved the burning of a restaurant which received natural gas from out of state and which had been insured by out of state insurance companies, the Seventh Circuit indicated that its decisional law relating to the federal arson statute and private residences was still valid and was unaffected by *Lopez*.

Recognizing that "several cases decided under the arson statute since *Lopez* reject this approach" (including the Ninth Circuit's decision in *Papadopoulos* and the Eleventh Circuit's decision in *Denalli* relied upon by present defendants), the Seventh Circuit nevertheless wrote:

> The noncommercial character of the torched building strikes us as irrelevant. *The supplying of gas to private homes is a major interstate activity, and its potential disruption by arson is therefore a legitimate matter of federal concern.* If the federal law forbade all arsons, including ones that had not even a slight effect on commerce, the aggregation principle would be inapplicable. X+O is not greater than X. The statute requires proof that the arson with which the defendant is charged have some effect on commerce; only it needn't be a large effect, since the sum of many small effects can be a large effect.

Hicks, supra at 189 (emphasis added). "[T]he activity regulated by the arson statute is the burning of property used in or affecting commerce, and it doesn't take any fancy intellectual footwork to conclude that the aggregate effect of such arsons on commerce is substantial." *Id.*

Given the language in *Hicks* and the predecessor cases in the Seventh Circuit, this Court has no choice to conclude that

where, as here, an arson is alleged to have been committed on a residence which receives natural gas from out-of-state, jurisdiction is proper in this Court under 18 U.S.C. § 844(i). That being the case, the defendants' motions to dismiss must be denied.

Conclusion

On the basis of the foregoing, the "Motion to Dismiss" filed by defendant Jermaine M. Gist on April 21, 1998 is DENIED. Likewise, the "Motion to Dismiss" by defendant Dewey M. Jones filed May 4, 1998 is DENIED.

SO ORDERED this 19th day of May 1998.

/s/ WILLIAM C. LEE
William C. Lee, Chief Judge
United States District Court

[TITLE OMITTED IN PRINTING]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA

TRANSCRIPT OF TRIAL PROCEEDINGS
HELD JUNE 17, 1998, BEFORE THE HON. WILLIAM C. LEE, UNITED STATES DISTRICT JUDGE

* * * [73] * * *

MS. NOMMAY: The parties have

[74]

stipulated that a Molotov cocktail is a destructive device and that it's an incendiary bomb and it's defined as a firearm under Title 18 United States Code Section 921 and 26 United States Code Section 5845.

Further, the defendants and the Government stipulate that the cause of the fire and the damage to the fire of the house at 2610 Marcy Lane was a Molotov cocktail that had been thrown through the window by Dewey Jones.

* * *

PAMELA SUE WALTERS, called as a Witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * * [75] * * *

Q. How are you employed, Ms. Walters?

A. I'm an insurance adjuster with American Family Insurance.

Q. And where are you employed, what office?

A. For Fort Wayne, Indiana.

Q. Okay. What type of office is that?

A. A claims office.

* * *

Q. Where is American Family's headquarters?

A. Madison, Wisconsin.

* * * [76] * * *

Q. Was a claim on a homeowner's policy paid by American Family for damage done to 2610 Marcy Lane, the home of James and Lisa Walker?

A. Yes.

Q. And actually how is that claim paid, is it a check, a draft, cash?

A. It's a draft.

Q. All right. Can you explain to me [the] significance of a draft?

A. A draft is not guaranteed funds. It is submitted to the insured's bank, and then our bank has to pay their bank the money.

Q. All right. And when you say "our bank", where is your bank?

[77]

A. In Madison, Wisconsin.

* * *

Q. There are offices in the Fort Wayne area where agents sell insurance for American Family; is that correct?

A. That's correct.

Q. And are those agents considered employees of American Family?

A. Yes, they are.

Q. And the claim that you paid on the homeowner's insurance policy, that was for the damage that resulted from 2-23 of '98, is that correct?

A. Yes, that's correct.

* * *

CROSS EXAMINATION

* * *

Q. It's my understanding from the phone book in Fort Wayne, May of 1998 that there are, in fact, 19 agencies in Fort Wayne,

[78]

Indiana?

A. I don't know for certain. There are agencies here in Fort Wayne.

Q. Several?

A. Yes.

Q. Is that the ad for American Family Insurance?

A. Yes, it is.

Q. And that's in Fort Wayne, Indiana?

A. Yes, it is for the agents in Fort Wayne, Indiana.

Q. Okay. Can you count the agents in that Fort Wayne ad?

A. There's 18.

* * * [79] * * *

Q. Going to hand you what's been marked as Defendant's Exhibit A. Does that appear to be something off the web as to American Family Insurance?

A. Yes, it does.

Q. And is that Fort Wayne, Indiana the agents in Fort Wayne, Indiana?

A. Yes, they are.

[80]

Q. Can you count the agents on that web page in Fort Wayne, Indiana?

A. Twenty.

* * *

Q. I hand you what has been marked as Defendant's Exhibit B. Does that appear to be the web page of all the different cities in the State of Indiana where American Family Insurance does business?

A. That I can't tell you. It does look like it's complete, but I can't tell you for certain. I don't know all the cities.

Q. What's your territory in settling claims?

A. Fort Wayne.

Q. Any other areas?

A. No.

Q. Okay. Does this appear to be 108 cities in the State of Indiana listed on that web page?

A. Approximately.

Q. Okay. Would it be fair to say that American Family Insurance does extensive

[81]

business within the State of Indiana?

A. Based on that information, it appears so.

Q. Okay. What's the name of the bank that this claim check was written off?

A. I don't know.

Q. So that bank could also do business in the State of Indiana?

A. I don't know.

* * * [82] * * *

ANTHONY LEE WEST, called as a Witness herein, having been first duly sworn, was examined and testified as follows;

DIRECT EXAMINATION

* * *

Q. Hour you employed, sir?

A. I work for Midland Mortgage Company.

Q. Where is that company located?

A. Oklahoma City, Oklahoma.

Q. Is that the headquarters of the company?

A. It is.

Q. Any offices here in Indiana?

A. No.

Q. What types of things does your company, Midland Mortgage, do?

A. We service mortgage loans.

Q. Which department are you assigned to at Midland Mortgage?

[83]

A. I'm the supervisor of the Hazard Insurance Department.

* * *

Q. Okay. Can you tell me about that Hazardous Insurance Department and the things that you do there?

A. Okay, we're just simply, we make the payments to the insurance companies as renewal periods come up for all of our mortgage loans.

Q. And the payments that you make, the insurance premiums, where do those — where does that money come from?

A. It comes from the payments, the mortgagers make.

Q. Are you familiar with the address 2610 Marcy Lane or the names James and Lisa Walker?

A. Yes, I am.

Q. What can you tell me about that property at

[84]

2610 Marcy Lane?

A. I just received a call from the Walkers stating their property had burned, and that their insurance company originally was not going to cover it and that's when I got involved when the insurance company was not going to cover it.

Q. Okay. So you got the insurance company to cover it because you had paid the premium; is that correct?

A. Correct.

Q. And the premium comes from Oklahoma City, correct?

A. Correct.

Q. And I take it that must mean, then, that Midland Mortgage Company has a mortgage on the residence at 2610 Marcy Lane?

A. Yes, we do.

Q. So then insurance premiums were paid by your department to American Family Insurance Company for coverage that included the fire on February 23rd of 1998?

A. It was taken to the agent of American Family.

* * * [85] * * *

CROSS EXAMINATION

* * *

Q. First of all, this — this mortgage that you hold, is that the original mortgage or was that brokered out?

A. The original mortgage is written and then assigned out. We were assigned the mortgage by City Corp. Mortgage.

* * *

Q. Okay. And you didn't buy this insurance

[86]

policy, the Walkers in their monthly payment paid for this insurance policy?

A. Correct.

Q. And just protect yourself, or to make sure the insurance is on the property, you just forward it onto American General, right?

A. Right.

Q. Or American Family Insurance here in Fort Wayne?

A. Right.

Q. Okay. And so you suffered no loss in this fire at all?

A. No.

* * * [87] * * *

RAY VUKAS, called as a Witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * *

Q. Mr. Vukas, how are you employed?

A. I'm employed by Nipsco as a security investigations functions.

Q. What does Nipsco stand for?

A. Northern Indiana Public Service Company.

* * *

Q. Is it your company's practice to maintain records of all the residents that receive natural gas from Nipsco?

A. Yes, we do.

[88] * * *

Q. All right. Did you cause a search to be done on your records to determine if the residence at 2610 Marcy Lane in Fort Wayne, Indiana was receiving Nipsco natural gas on 2-23 of 1998?

A. Yes, I did.

Q. And what did you find, according to your records?

A. According to our records, that address, has Nipsco Gas service.

Q. On 2-23 of 1998?

A. Yes.

* * * *

[90] * * *

CECILIA LARGURA, called as a Witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

[91] * * *

Q. And Ms. Largura, how are you employed?

A. I'm employed by Nipsco Industries Management Services, Corporate Gas Supply.

* * *

Q. All right. If you were in the gas supply department, can you tell me where it is Nipsco gets its supply of natural gas?

A. Nipsco gets its supply of natural gas through field areas or field zones. The majority in south Texas, Louisiana, the Permian (phonetic) Basin, the Rocky Mountains, Canadian supply and the mid-Continent basin. We transport those supplies to our Northern Indiana territory.

Q. So natural gas is not coming from Indiana?

A. It's not produced in Indiana, that's correct.

* * * *

[111]

LISA WALKER, called as a Witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * *

Q. On 2-23 of this year, where were you living?

A. At Marcy Lane, 2610 Marcy Lane.

Q. Is that a house or an apartment?

A. A house.

Q. Who lived there with you?

A. My husband, and his three children.

Q. Where you renting or did you own this home?

A. Um —

Q. Was there a mortgage on your house?

A. Yes.

Q. Was the mortgage on your house on 2-23,

[112]

'98?

A. Yes.

Q. Whose your mortgage company?

A. Midland Mortgage Company.

Q. Do you make monthly payments to them?

A. Yes.

Q. Where do you send those monthly payments?

A. Oklahoma City.

Q. Did you submit a claim to your insurance company for fire loss?

A. Yes.

Q. Did they, in fact, pay that claim?

A. Yes.

Q. Is that American Family Insurance Company?

A. Yes.

Q. On 2-23, did your residence have gas appliances or gas heat?

A. Yes.

Q. And on 2-23, did your Nipsco or did your residence receive gas from Nipsco?

A. Yes.

* * * *

[184] * * *

MR. ARATA: And my objection is to the Court's Instruction Number 19, which is the definition of interstate commerce. Especially, it's as to the second sentence which reads, quote, "to show that real property was used in activity affecting interstate commerce, the government need only establish a minimal connecton between the real property at issue and some aspect of interstate commerce."

I believe that's a misstatement of the law. It changes the burden of proof of the Government from which should be proof beyond a reasonable doubt. Also interstate commerce is an element of the offense and that is shown in instruction number 16 which specifically requires in paragraph 4 that the real property used in interstate or foreign commerce or any other

[185]

activity affecting interstate or foreign commerce, period. Being an element, the Government must prove that beyond a reasonable doubt and as it's now written, that is no longer required.

Case law has held that the word — that a defendant could not insert the word substantially affected interstate commerce, but I have never seen a case that allows the Government to insert the word minimally affected interstate commerce.

To the contrary, my understanding of the case that's cited is that is just — the Government must show some sort of minimal connection with interstate commerce for the Govern-

ment to have any jurisdiction in this matter and the authority to legislate in such areas. However, again, proof of this element is required to be proven beyond a reasonable doubt. My proposal would be either to delete the entire instruction or delete the second sentence of that instruction. That's it.

* * * *

[TITLE OMITTED IN PRINTING]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA

TRANSCRIPT OF TRIAL PROCEEDINGS
HELD JUNE 18, 1998, BEFORE THE HON. WILLIAM C. LEE, UNITED STATES DISTRICT JUDGE

[2] * * *

THE COURT: Good morning. * * * The only substantial objection was by the defendant to the Court's proposed number 19 is now 17. That is the instruction that defines interstate commerce, and instructs the jury on what the Government needs to prove to satisfy that element of the offense. This is the same instruction, which was used in United States versus Wing, 104 Fed.3d 986 at page 991, Seventh Circuit, 1997. The use of that instruction was held not to be error in that case, although

[3]

there was more than — more in that case than regarding the interstate commerce, i.e., it was a restaurant. Nevertheless, Seventh Circuit approval of that instruction is a correct statement of law in light of its earlier addition, United States versus Martin, 63 F.3d 1422, Seventh Circuit 1995, which held there need only be a de minimis connection to interstate commerce is still good law in the Seventh Circuit and that's what I'm going to follow.

So I'm going to overrule that objection, and that instruction stays in. It is now number 17 in the Court's final instructions. So I have the new instructions for you.

* * * [30] * * *

JURY INSTRUCTIONS READ

THE COURT: Members of the jury: The evidence and arguments in this case have been completed and I will now instruct you as to the law applicable to this case.

* * * *

[35] * * *

In Count One, the defendant is charged with violating 18 U.S.C. Section 844(I), which provides in pertinent part, whoever maliciously

[36]

damages or destroys or attempts to damage or destroy by means of fire or any explosive, any building, vehicle or other real or personal property, used in interstate commerce, used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce commits an offense against the United States.

* * * To sustain a charge of arson in violation of 18 U.S.C. Section 844(I0, contained in Count One of the indictment, the government must prove the following proposition: One, the defendant

[37]

maliciously, two, damaged or destroyed or attempted to damage or destroy, three, by means of fire or an explosive, four, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty on Count One. If, on the other hand you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty on Count One.

The terms maliciously as used in Section 844(I) means the defendant acted intentionally or with wilful disregard or the likelihood that damage or injury would result from his acts.

The term interstate commerce means travel, trade, traffic, commerce, transportation, or communication among several states. To show that real property was used in activity affecting interstate commerce, the government

[38]

need only establish a minimal connection between the real property at issue and some aspect of interstate commerce.

* * * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	1:98-CR-16
	)	
DEWEY J. JONES	)	

MEMORANDUM OF DECISION AND ORDER

This matter is before the Court on defendant Dewey J. Jones' "Motion for Judgment of Acquittal Following Discharge of Jury" filed June 23, 1998. The government responded to that motion on June 26, 1998. For the following reasons, the motion will be denied.

Discussion

On March 25, 1998, a three count indictment was returned in the above-entitled cause. The charges in the indictment stem from the firebombing of a residential home on Marcy Lane in Fort Wayne, Indiana on February 23, 1998. Count 1 specifically alleged that defendants Dewey J. Jones and Jermaine M. Gist "maliciously damaged and destroyed and attempted to damage and destroy by means of fire and explosive material, real property . . . used in interstate commerce and in any [sic] activity affecting interstate commerce" in violation of 18 U.S.C. § 844(i) and that they aided and abetted in the same in violation of 18 U.S.C. § 2. Count 2 alleged that both defendants knowingly used or carried a firearm during and in relation to a crime of violence, also in violation of the above statutes. Count 3 alleged that defendant Jones knowingly made a firearm without complying with federal requirements in violation of 28 U.S.C. § 5861(f).

Defendants were tried before a jury commencing on June 17, 1998. At the close of the government's case, this Court entered a judgment of acquittal in favor of defendant Gist. On June 17, 1998, the jury returned a verdicts of guilty on all counts with respect to defendant Jones.[1]

The present motion is directed towards counts one and two. It is defendant's position that the government failed to establish that the real property was used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce and hence the government failed to prove an essential element for both of those counts.[2]

A motion for acquittal may not be granted if, viewing the evidence in the light most favorable to the prosecution, there is relevant evidence from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *United States. v Reed*, 875 F.2d 107, 111 (7th Cir. 1989); *United States v. Pope*, 739 F.2d 289, 291 (7th Cir. 1984). In applying this standard, it is incumbent upon the court to recognize that it is the jury which has the exclusive authority to assess the witnesses' credibility, resolve evidentiary conflicts and draw reasonable inferences from the evidence presented. *Reed, supra* at 111. "The test that the court must use is whether at the time of the motion there was relevant evidence from which the jury could reasonably find [the defendants] guilty beyond a reasonable doubt." *United States v. Weed*, 689 F.2d 752 (7th Cir. 1982).

The government's evidence at trial tended establish an interstate connection based upon three things: natural gas

---

[1] Since defendant Jones is the only defendant remaining, hereinafter he will be referred to simply as defendant.

[2] A similar argument was raised by both defendants in motions to dismiss. This Court denied those motions by order dated May 19, 1998.

being supplied to the residence at 2610 Marcy Lane; an insurance claim which was paid by an out-of-state insurer; and mortgage payments which were being paid out-of-state. Briefly, the evidence was as follows:

> →Northern Indiana Public Service Company (NIPSCO) supplied natural gas to the residence on the date of the firebombing. NIPSCO gets its gas from outside of Indiana, generally from Texas or Louisiana or Canadian provinces.
>
> →Midland Mortgage Company had a mortgage on the residence. Monthly mortgage payments were made to Midland in Oklahoma City, Oklahoma. From those payments, insurance premiums were paid annually to American Family Insurance in Indiana.
>
> →American Family Insurance had homeowner's insurance coverage on the house. Its home office is in Madison, Wisconsin and drafts for claims made on the policy (one was made here) are paid via the company's bank in Madison.

It is the government's position that such evidence adequately provided the interstate commerce connection.

In his motion for judgment of acquittal, defendant asserts that the damaged real estate, a private residence, was not shown to have been a part of interstate commerce. With respect to each of the connections sought to be established by the government, the defendant argues:

> "Two representatives from NIPSCO Industries, the parent corporation, testified that this private residence received natural gas from NIPSCO, a subsidiary doing business in Indiana. Both NIPSCO corporations are Indiana Corporations and regulated by the Indiana Regulatory Commission. However, no one from NIPSCO testified that the intrastate services received from NIPSCO Industries or NIPSCO, Inc. were affected

in any way as a result of this fire. No one testified that the natural gas lines were damaged in any manner. No one testified that the natural gas services were even turned off as a result of this fire. Finally, no one from NIPSCO testified that they even lost any business whatsoever as a result of this fire.

"As to the Mortgage holder, Midland Mortgage Company, its representative testified that it suffered no loss as a result of this fire. Further, no one, including the Midland Mortgage representative, testified that Midland Mortgage was affected in any manner.

"As to American Family Insurance, the insurance company has 18 to 20 agents in Fort Wayne, Indiana. The insurance company has its own 'Claims office' in Fort Wayne which handled the claim as a result of this fire. While the claims agent testified that the settlement 'draft' was written by its out of state bank, the agent did not even know the name of the bank. Further, the agent admitted that this bank may in fact do business in Indiana. No copy of the draft was admitted into evidence. no copy of the canceled check allegedly used to pay this claim was ever introduced into evidence. No evidence was introduced as to where the Walker's did their own banking. For all we know, this was an 'intra-bank' transaction occurring in Fort Wayne, Indiana, with a Fort Wayne, Indiana bank.

(Rec. 59, pp 4-5).

While defendant has raised interesting arguments with respect to the amount of evidence required to prove the interstate commerce nexus, this Court is of the view that prevailing Seventh Circuit law establishes that the evidence offered here is sufficient to support the conviction. Indeed, the natural gas connection alone suffices to supply the interstate commerce element.

In *United States v. Stillwell*, 900 F.2d 1104 (7th Cir. 1990), defendant argued that the residence he was accused of torching was not "used in interstate or foreign commerce" or "in an activity affecting interstate or foreign commerce" as required by the statute because, as stipulated at trial, "the only nexus between Stillwell's house and interstate commerce was that Northern Illinois Gas Company supplied Stillwell's house with natural gas it obtained from sources outside the State of Illinois." *Stillwell*, 900 F.2d at 1106. Noting that "[t]his court has considered, but left open, the question whether the supply of interstate natural gas alone satisfies the arson statute's commerce requirement," the Seventh Circuit field that it "believe[d] Congress intended § 844(i) to reach a private residence which is supplied with natural gas." *Id.*, at 1107.

Later, in *United States v. Hicks*, 106 F.3d 187 (7th Cir. 1997), a case involving the burning of a restaurant that received natural gas, the Seventh Circuit reaffirmed its view of just how far the statute reaches. The court wrote that "the noncommercial character of the torched building strikes us as irrelevant" and that "the supplying of gas to private homes is a major interstate activity, and its potential disruption by arson is therefore a legitimate matter of federal concern." *Id.* at 189. The court also wrote:

> The jury question is whether the transaction in issue involved or affected commerce; for that is the commerce element in the statute, as distinct from the constitutional precondition to the statute's being valid. Because the arson statute was intended to exert Congress's full power under the commerce clause to prevent arson . . . all the jury in our case had to find was a slight effect on interstate commerce, since, as we have explained, that is all that is necessary to bring the aggregation principle into play. The judge instructed the jury that 'the government need only establish a minimal connection between the property at issue and some aspect of interstate

commerce.' That is correct. And the burden that this formulation places on the Government was carried.

Id. at 190.

Given the holding in *Stillwell* and the language in *Hicks*, it is clear that the motion for judgment of acquittal must be denied. While defendant makes an interesting argument that the evidence did not show any harm to the natural gas supplier, it would not appear that that is required under present Seventh Circuit case law.

Conclusion

On the basis of the foregoing, defendant Dewey J. Jones' "Motion for Judgment of Acquittal Following Discharge of Jury" filed June 23, 1998 is DENIED.

SO ORDERED this 27th day of July 1998.

/S/ WILLIAM C. LEE
William C. Lee, Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

UNITED STATES OF AMERICA,	JUDGMENT IN A CRIMINAL CASE
V.	CASE NUMBER: 1:98-CR-16
DEWEY J. JONES	PATRICK J. ARATA 219/424-1010 DEFENDANT'S ATTORNEY

The Defendant:

( ) pleaded guilty to count(s) _____.

( ) pleaded nolo contendre to count(s) _____ which was accepted by the court.

(X) was found guilty on counts 1, 2 and 3 after a plea of not guilty.

Title & Section	*Nature of Offense*	*Date Offense Concluded*	*Count Number(s)*
18:844(I); 18:2	Damage/Destruction by means of fire and explosive devices, real property used in interstate commerce; aiding & abetting	2/26/98	1
18:924(c); 18:2	Use of Molotov Cocktail during crime of violence; aiding & abetting	2/26/98	2
26:5861(f)	Unlawful making a firearm (Molotov cocktail)	2/26/98	3

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

( ) The defendant has been found not guilty on count(s) .
( ) Count(s) ___ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

DEFENDANT'S SOC. SEC. NO.: 365-84-1943

DEFENDANT'S DATE OF BIRTH: 12/13172

DEFENDANT'S USM NO.: 05411-027

DEFENDANT'S MAILING ADDRESS:

18150 PARTON STREET
DETROIT, MICHIGAN 48219

AUGUST 26, 1998
DATE OF IMPOSITION OF SENTENCE

/s/ WILLIAM C. LEE
SIGNATURE OF JUDICIAL OFFICER

WILLIAM C. LEE, CHIEF JUDGE
NAME & TITLE OF JUDICIAL OFFICER

DEFENDANT'S RESIDENCE ADDRESS:

DEFENDANT INCARCERATED

AUGUST 26, 1998
DATE

DEFENDANT: DEWEY J. JONES JUDGMENT – PAGE 2 OF 7
CASE NUMBER: 1:98-CR-16-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of four hundred twenty (420) months, consisting of sixty (60) months on Count 1, forty-six (46) months on count 3, to

run concurrently, and three hundred sixty (360) months on Count 2, to run consecutively to counts 1 and 3.

( ) The court makes the following recommendations to the Bureau of Prisons:

(X) The defendant is remanded to the custody of the United States Marshal.

( ) The defendant shall surrender to the United States Marshal for this district:

( ) at _____ a.m./p.m. on _____.

( ) as notified by the United States Marshal.

( ) The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

( ) before 2 p.m. on _____.

( ) as notified by the United States Marshal.

( ) as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

BY _____
DEPUTY MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years on Count 2 and three (3) years on each of counts 1 and 3, all such terms to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime. The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to or * * * drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

( ) The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

(X) The defendant shall not possess a firearm as defined in 18 U.S.C. § 921.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The

defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL CONDITIONS OF SUPERVISION

The defendant shall participate, under a co-payment plan, in a drug aftercare treatment program which may include urine testing at the direction and discretion of the probation officer. As part of the co-payment program, the defendant will be held responsible for 3% per $100.00 of his net wages as determined by the probation office. If the defendant is unemployed or receiving public assistance, the defendant will be held responsible for a co-payment of $10.00 per month. Payments are to be made on a per visit basis.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule payments set forth in Sheet 5, Part B.

Count	Assessment	Fine	Restitution
1	$100.00	waived	$77,386.87
2	$100.00	waived	
3	$100.00	waived	

( ) If applicable, restitution amount ordered pursuant to plea agreement $_____

Totals:	$300.00	$waived	$77,386.87

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $_____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid I full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default an delinquency pursuant to 18 U.S.C. § 3612(g).

( ) The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

( ) The interest requirement is waived.

( ) The interest requirement is modified as follows:

RESTITUTION

( ) The determination of restitution is deferred in a case brought under Chapters 109A, 110, 110A, and 113A of Title 18 for offense committed on or after 09/13/1994,

until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

( ) The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a payment, each payee shall received an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage Payment
American Family Ins.	$77,386.87	$77,386.87	
Totals	$77,396.87	$77,386,87	$

* Findings for the total of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committee on or after September 13, 1994.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal penalties shall be due as follows:

A (X) ASSESSMENT in full immediately; or

B (X) RESTITUTION payments shall be made from any wages the defendant may earn in prison in accordance with the Bureau of Prisons' Inmate Financial Responsibility Program. Any portion of the restitution that is not paid in full at the time of the defendant's release from imprisonment shall become a condition of supervision.

C ( ) no later than _____; or

D ( ) in installments to commence _____ days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E ( ) in _____ (e.g., equal, weekly, monthly, quarterly) installments of $_____ over a period of _____ year(s) to commence _____ days after the date of this judgement.

The National Fine Center will credit the defendant for all payment previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

( ) The defendant shall pay the costs of prosecution.

( ) The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment.

DEFENDANT: DEWEY J. JONES JUDGMENT – PAGE 7 OF 7
CASE NUMBER: 1:98-CR-16-1

STATEMENT OF REASONS

(X) The court adopts the factual findings and guideline application in the presentence report.

OR

( ) The court adopts the factual findings and guideline application int he presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court

Total Offense Level: 21

Criminal History Category: III

Imprisonment Range: 46 to 57 months on each of counts 1 and 3 (mandatory minimum 60 months on count 1, by statute)

30 years statutory mandatory minimum on Count 2

Supervised Release Range: 3 to 5 years

Fine Range: $7,500 to $75,000

(x) Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitutions: $77,386.87

( ) Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

( ) For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18 restitution if not ordered

because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

( ) Partial restitution is ordered for the following reason(s):

(X) The sentence is within the guidelines range, that range does not exceed 24 months, and the court finds not reason to depart from the sentence called for by the application of the guidelines.

OR

( ) The sentence is within the guideline range, that range exceed 24 months, and the sentence is imposed for the following reason(s)

OR

( ) The sentence departs from the guideline range:

( ) upon motion of the government, as a result of defendant's substantial assistance.

( ) for the following specific reason(s):

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

DEWEY J. JONES, DEFENDANT-APPELLANT.

No. 98-3255.

UNITED STATES COURT OF APPEALS,
SEVENTH CIRCUIT.

ARGUED APRIL 27, 1999.
DECIDED MAY 17, 1999.

David H. Miller (argued), Tina L. Nommay, Office of the United States Attorney, Fort Wayne, IN, for Plaintiff-Appellee.

Richard H. Morgan (argued), Pontiac, MI, for Defendant-Appellant.

Before ESCHBACH, EASTERBROOK, and DIANE P. WOOD, Circuit Judges.

EASTERBROOK, Circuit Judge.

Dewey Jones tossed a Molotov cocktail into his cousin's living room; fire severely damaged the home. A jury convicted Jones of arson, 18 U.S.C. § 844(i), making an illegal destructive device (the firebomb), 26 U.S.C. § 5861(f), and using a destructive device during and in relation to a crime of violence (the arson), 18 U.S.C. § 924(c). His appeal challenges only one of these three convictions. Jones contends that § 844(i) exceeds Congress's power under the Commerce Clause (Art. I § 8 cl. 3) when applied to the destruction of a residence rather than a commercial establishment.

This is a tough row to hoe, and not only because the court has rejected the argument before. *United States v. Stillwell*, 900 F.2d 1104 (7th Cir.1990). Section 844(i) requires proof that the torched property was "used in inter-

state or foreign commerce or in any activity affecting interstate or foreign commerce". If this is proved, then an adequate connection to interstate commerce is established. So the eighth circuit held in *United States v. Rea*, 169 F.3d 1111 (8th Cir.1999), and *United States v. Flaherty*, 76 F.3d 967, 973-74 (8th Cir.1996), in the course of declaring *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), irrelevant to prosecutions under § 844(i). But it is difficult to dispatch the constitutional objection quite this easily. *Lopez* says that the power of Congress is limited to activities that substantially affect commerce, 514 U.S. at 559, 115 S.Ct. 1624, while proof of a small effect will satisfy the statute. In this case the jury was entitled to conclude that the owner of the residence purchased natural gas in interstate commerce, secured a mortgage from an out-of-state lender, and received an insurance check from an out-of-state insurer. Purchases of gas would diminish while reconstruction occurred, and perhaps the arson would affect repayment of the loan. But these interstate connections are pretty slight for a single building; they don't establish a "substantial" connection between this arson (or this residence) and interstate commerce. So the jury's finding is not necessarily sufficient; and the fact that *Lopez* post-dates *Stillwell* means that we cannot rest content with a citation to that case.

Two circuits have distinguished between commercial and residential property and held that the national government lacks the constitutional authority to punish arsons of residences. Compare *United States v. Serang*, 156 F.3d 910 (9th Cir.1998) (commercial), with *United States v. Pappadopoulos*, 64 F.3d 522 (9th Cir.1995) (residential); compare *United States v. Grimes*, 142 F.3d 1342 (11th Cir.1998) (commercial), with *United States v. Denalli*, 73 F.3d 328 (11th Cir.) (residential), modified on other grounds, 90 F.3d 444 (1996). Jones wants us to follow these decisions. A prior decision declining to do so, *United States v. Hicks*, 106 F.3d 187 (7th Cir. 1997), involved a commercial establish-

ment; our statement that there is no constitutional line between commercial and residential property was dictum, Jones insists.

No, it was not dictum. *Hicks* analyzed the scope of national power under the commerce clause and observed that, after *Lopez*, any activity that substantially affects commerce may be regulated. Although living in one's own house is not commerce, the residential housing industry is interstate in character. Goods and materials for housing move across state borders; gas and electricity likewise; the financial and insurance markets that provide loans and spread risks have national if not international scope; arson can substantially affect all of these. This was the background for our statement that "[t]he noncommercial character of the torched building strikes us as irrelevant. The supplying of gas to private homes is a major interstate activity, and its potential disruption by arson is therefore a legitimate matter of federal concern . . . . The statute requires proof that the arson with which the defendant is charged have some effect on commerce; only it needn't be a large effect, since the sum of many small effects can be a large effect. . . . Categories such as private residence and rental apartment building do not appear in the commerce clause or the arson statute; nor is there anywhere else in the law to look for guidance as to how finely to categorize the types of property that might be damaged or destroyed by arson. Categorize finely enough and the interstate effects evaporate and the statute is nullified." 106 F.3d at 189-90. This was why the defendant in *Hicks* was wrong to argue that a substantial effect on commerce had to be established from his particular arson; or from arsons of commercial buildings in Portage, Wisconsin; or from arsons of commercial buildings generally. "Arsons of buildings" substantially affect interstate commerce; that holding of *Hicks* applies to Jones's arson of a residential structure in Indiana just as it applied to Hicks's arson of a commercial structure in Wisconsin.

None of the arguments offered in this case, or by *Pappadopoulos* or *Denalli*, persuades us that *Hicks* or *Stillwell* is wrong. Cases such as *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 100 S.Ct. 502, 62 L.Ed.2d 441 (1980), conclude that residential property in the aggregate substantially affects interstate commerce. *McLain* holds that an agreement among a few brokers to fix commissions on sales of residential property in New Orleans thus is within the commerce power. See also, *e.g.*, *Goldfarb v. Virginia*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) (attorneys' agreement on fees for residential real estate title searches is within commerce power); *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 111 S.Ct. 1842, 114 L.Ed.2d 366 (1991) (exclusion of a single physician from one hospital is within the commerce power because the provision of health care in the aggregate significantly affects commerce).

If instead of asking whether "residential real estate" substantially affects commerce we ask whether "arson of buildings" or even "arson of residences" substantially affects commerce, the answer still must be yes. According to the Federal Bureau of Investigation, there were 69,269 reported arsons in 1997, the most recent year for which complete data are available. *Uniform Crime Reports 1997* Table 2.32 (1998). Of these arsons, 33,848 involved buildings; and 19,888 of the buildings were residential (13,692 single-family dwellings and 6,196 multi-family residences). The damage was a little more than $14,000 per residential arson. *Id.* at Table 2.34. That's a total of approximately $280 million lost to residential arsons in 1997 alone. If even a small fraction of the loss is covered by interstate insurance markets, the effect is "substantial." Most of these arsons also affected gas, electric, and telephone service, required the occupants to stay at hotels while repairs were completed (a sure sign of interstate commerce, see *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964)), led friends and loved ones to travel from other states

to give comfort to the victims, and so on. This collective effect, plus proof of a slight connection between the particular arson and interstate commerce, permits the national government to establish substantive rules of conduct.

AFFIRMED.

Supreme Court of the United States

No. 99-5739

Dewey J. Jones,
Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to the following question: Whether, in light of United States v. Lopez, 514 U.S. 549 (1995), and the interpretive rule that constitutionally doubtful constructions should be avoided, see DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 575 (1988), Section 844(i) applies to the arson of a private residence; and if so, whether its application to the private residence in the present case is constitutional.

November 15, 1999